SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 54

MARTIN J. BERNARDS AND LENA BERNARDS,
Petitioners,

vs.

M. R. JOHNSON, CATHERINE COLLINS, THE UNITED STATES NATIONAL BANK OF PORTLAND AND JOSEPH H. LOOMIS, TRUSTEE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITIONERS' BRIEF ON THE MERITS.

WILLIAM LEMKE,
Counsel for Petitioners.

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PETITIONERS' BRIEF ON THE MERITS.

Nature of the Case.

This case is here on certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, and involves the construction and interpretation of Section 203, Title 11, U. S. C. A. as amended. The question involved is the propriety of the action of the United States Circuit Court of Appeals for the Ninth Circuit in denying petitioners' application to recall the mandate and correct the judgment based upon a prior decision.

Opinion Below.

The final order of the United States Circuit Court of Appeals for the Ninth Circuit rendered on March 22, 1940, denying petitioners' application to recall the mandate and

correct the judgment entered in the District Court pursuant to the decision of the Circuit Court of Appeals handed down on May 2, 1939, was rendered without opinion. The original opinion of the Circuit Court of Appeals of May 2, 1939, affirming separate orders in bankruptcy of the District Court of the United States of the District of Oregon, is reported in 103 F. (2d) 567.

Jurisdiction.

Certiorari was granted by order of this Court made and entered April 29, 1940. The Supreme Court of the United States has jurisdiction because the case involves the construction and interpretation of Federal statutes, to-wit: Section 75 of the Bankruptcy Act.

Statement of the Case.

This proceeding was initiated by petitioners on August 10, 1934, in the District Court of the United States for the District of Oregon by a petition for composition or extension pursuant to Section 75 of the Bankruptcy Act (R. 1-2).

Included in the schedules attached to said petition were 16 parcels of real property in Washington County, Oregon, owned by petitioners, one of which was mortgaged to the Respondent Collins and all of which were mortgaged to the respondent M. R. Johnson. The Johnson mortgage or some interest therein had been assigned to the Respondent, the United States National Bank. The obligations secured by the mortgages were past due and suits to foreclose had been commenced in the State courts. A foreclosure decree had previously been entered on the Johnson Mortgage but suit was still pending upon the Collins Mortgage when the petition was filed (R. 1-2).

On the same day, an order was entered by the court approving the petition as filed in good faith and the cause

was referred to a Conciliation Commissioner (R. 6). On December 19, 1934, petitioners filed their amended petition asking to be adjudged bankrupts under subsection (s) of Section 75 of the Bankruptcy Act and to have the benefits of the provisions of said subsection (R. 9-13). The same day an adjudication was entered and on December 20, 1934, the case was referred to a Referee in Bankruptcy (R. 14).

On February 8, 1935, petitioners addressed their petition to the court and the Referee asking for an appraisal and retention of possession of the whole of their estate (R. 36-37). Pursuant thereto, appraisers were appointed by the Referee but on May 27, 1935, before any appraisal was made, subsection (s) of said Section 75 was held unconstitutional by the Supreme Court (*Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555).

The proceedings herein were not dismissed but remained pending.

On June 29, 1935, a purported Sheriff's sale of the real property and certain bonds claimed as additional security for the mortgage debt was held under the foreclosure decree in favor of Respondent Johnson *et al.* in the State court, and the property and bonds were bid in by Respondents Johnson and The United States National Bank for a sum about $18,000 less than the amount of the decree. On July 9, 1935, Respondent Collins obtained a purported foreclosure decree in the State court and pursuant thereto, a pretended Sheriff's sale was held on August 26, 1935, at which the Respondent Collins bid in the property which had been mortgaged to her. These sales were confirmed on July 20, 1935, and September 16, 1935, respectively.

On August 28, 1935, subsection (s) of Section 75 was amended. Frazier-Lemke Act of August 28, 1935, C. 792, 49 Stat. 942, 943. On September 30, 1935, petitioners filed their petition in the District Court reciting the proceedings theretofore had and reciting that the proceedings and

documents in the possession of the referee should be transferred to the court to be referred to the Conciliation Commissioner for Washington County and asking for an order directing the referee to transfer to the court all documents and records together with a report of all proceedings therein (R. 16-17).

On said 30th day of September, 1935, an order was made and entered by the court recalling the order of reference to the referee and directing the referee to transmit to the court all records, documents and proceedings in his possession together with a report of all proceedings had before him and further ordering that the proceedings be referred to the Conciliation Commissioner for Washington County (R. 17-18). Accordingly the referee transmitted to the court the documents and records of the proceedings including the amended petition of December 19, 1934, and the petition of February 8, 1935, for the benefits of the act including the appointment of appraisers, appraisal, and retention of possession by petitioners (R. 36-37). This latter petition was marked "Filed October 10, 1935", by the clerk of the court and forwarded to the Conciliation Commissioner together with the other documents. On October 15, 1935, an order was entered by the court referring the cause to the Conciliation Commissioner "to take such further proceedings therein as are required by said acts" and directing the bankrupts to attend before the Conciliation Commissioner and to submit to his orders or the orders of the court relating to the bankruptcy (R. 19).

No action was taken by the Conciliation Commissioner other than to hold the first hearing. On February 1, 1936, the Respondents Johnson, The United States National Bank and Collins, obtained possession of the mortgaged property by means of a Writ of Assistance issued out of the State Court. On the same day at the request of the Portland Loan Company and without permission of the bankruptcy court

the Sheriff seized petitioners' furniture, household goods and bedding and two weeks later sold same. The mortgage debt on the furniture was only $300.00, which funds were used in the seeding of petitioners farm in the spring of 1934. Sheriff's Deeds were delivered to Respondents Johnson and Collins on July 1, 1936 and September 10, 1936 respectively.

On July 15, 1936, petitioners petitioned the Conciliation Commissioner for an order removing the mortgagees from the premises and requiring them to account to the debtors for the crops (R. 19-21). On July 24, 1936, Respondents Johnson and the United States National Bank filed an Answer and Cross Petition (R. 56). On August 8, 1936, petitioners filed their reply, and in addition to an order for the crops, requested of the Conciliation Commissioner an order permitting them the full benefits and provisions of the Frazier-Lemke Act as amended by Congress on August 28, 1935 (R. 22-23). On August 8, 1936, the Commissioner denied the debtors' petition and ordered the appointment of a Trustee (R. 49-53). On August 29, 1936, at a meeting of the creditors, respondent Loomis was elected by a minority of creditors and appointed by the Commissioner as Trustee in Bankruptcy and qualified on September 3, 1936 (R. 54). Creditors holding majority in amount of claims refused to approve a trustee as shown by affidavits attached to petition (R. 25-29). The Commissioner's orders appointing the Trustee and approving his bond were reviewed and on December 15, 1936, were affirmed by the court (R. 24).

On January 4, 1937, petitioners petitioned the Commissioner to remove the Trustee and put petitioners into immediate possession of the whole of their estate and to proceed with appraisal of property (R. 25-27). At a hearing on January 11, 1937, the Commissioner dismissed that petition (R. 30-31). At said hearing counsel for petitioners asked the Conciliation Commissioner whether or not in the

proceeding had before him, he proceeded under the Frazier-Lemke Act of August 28, 1935, and the Commissioner replied that he had. The Commissioner was then asked whether he had appointed appraisers under said act and if so, whether an appraisal had been made and the Commissioner replied that an appraisement had been made and produced from the files a document of that tenor and effect (R. 81-82). Petitioners were never informed prior to January 11, 1937, that an appraisal had been made, nor were they given an opportunity to object to appraisers, a universal practice.

The appraisals made (R. 58-61 and R. 63) do not include the following personal property, the value of which is fully two-thirds of the total value of personal property:

7 Orenco City Bonds (R. 45), value, $7000.00 plus accrued interest (R. 26).

1 Caterpillar No. 34 Combine with pickup and grain-grading attachments (R. 44).

1 International TA 40 Tractor, crawler type (R. 44).

1 Universal Logging Trailer (R. 45).

1 1933 Ford Pickup Automobile (R. 45).

1 11 x 12 air compressor, 2 water pumps, 1 Fairbanks Scales, 1 six-horse Steam Boiler, 115 cords wood, 1 blower (R. 45).

An Attachment upon three parcels of real property (R. 45-46) deeds to which have since accrued.

Household goods, furniture, etc. (R. 46-47).

Unpaid accounts (R. 47).

85 acres of hairy vetch; 50 acres of oats and Austrian Peas; 100 acres of Victory Oats, 90 acres Barley, 2 tons vetch seed (R. 43-44).

The personal property which was appraised shows an appraisal on the average of only 35% of its actual cash value. This is shown by the following two items:

550 tons chopped hay (R. 44) appraised as *only 300 tons*, and at *only $4.00 per ton* (R. 59), and sold at those amounts at *private* sale (R. 69). This chopped hay was worth $11.00 per ton.

Petitioners exempt property appraised at $497.00 (R. 61) was sold by petitioners for $1406.00.

No objection was ever made to the partial appraisal for the reason that the trustee appointed by the Commissioner (R. 54) took the property wrongfully from the petitioners, and for the further reason that petitioners never learned that an appraisal had been made until January 11th, 1937, and a large part of the personal property was sold three days later (R. 32) whereas Section 75 (s) grants four months in which to file objections.

Petitioners farm, its legal description being in 16 parcels, has not yet been appraised (R. 59).

There has not yet been included in the petitioners' schedule of assets as requested, a chose in action based on a pending law action against Respondent Johnson in the amount of $18,280.00 exclusive of court costs and punitive damages (R. 26).

On January 15, 1937, petitioners petitioned the court to reverse the commissioner's orders of August 8, 1936, September 3, 1936, and January 11, 1937 (R. 77-87). In answer to the petition respondent Collins prayed that her title to the mortgaged property be quieted, respondent Johnson and The United States National Bank prayed that their title to the mortgaged property be quieted, and the trustee prayed that the acts done by him be approved and that he be directed to complete the administration of the bankrupts' estate by payment of expenses and distribution to creditors (R. 81-91, 91-100).

On January 29, 1937, petitioners filed a petition with the Conciliation Commissioner asking a review of the Conciliа-

tion Commissioner's order of January 11, 1937, which order denied petitioners' request to remove trustee (R. 33-34).

On April 13, 1938, petitioners filed a motion to vacate and set aside all orders of the court and of the referee and conciliation commissioner where it was sought to set aside or delay the carrying out of the provisions of section 75 of the Bankruptcy Act and that the cause be promptly reinstated without any additional filing fees or charges. This motion was based upon contentions as follows:

1. That the referee in bankruptcy and the conciliation commissioners had no jurisdiction to pass on the adjudication of bankrupts or the qualifications of bankrupts to come under Section 75 of the Bankruptcy Act.

2. That the referee in bankruptcy and conciliation commissioners had no jurisdiction to proceed until they had complied with the mandatory provision of the Bankruptcy Act and particularly the provisions and the amendments of Section 75 of the Bankruptcy Act.

3. That under the amendments of Section 75 of the Bankruptcy Act approved March 4, 1938, where the Conciliation Commissioner had improperly held new subsection (s) unconstitutional as applied to the land, petitioners were entitled to have the cause promptly reinstated without additional filing fees or charges.

4. That after adjudication no further affirmative action by the petitioners is necessary until the referee and conciliation commissioners had complied with the mandatory provisions of the Bankruptcy Act and particularly Section 75 (R. 34-35).

On May 10, 1938, the court entered an order confirming order of Conciliation Commissioner denying petitioners' petition of January 4, 1937, which petition asked for the removal of the trustee (R. 39).

On May 10, 1938, the court made and entered findings of fact and ordered that petitioners' petition of January 15, 1937, be dismissed, granted the respondents the relief prayed for in their answer, and ordered that petitioners' motion of April 13, 1938, be denied (R. 37-39). In the findings upon which these orders were based the court found that the land was mortgaged, that foreclosure sales had been held, that there had been no redemption, that petitioners had made no attempt to comply with the conditions required of them in order to obtain the right and privilege of a three years' stay of enforcement of their obligations and the right to possession of their property; that at the time of filing their petition on December 19, 1934, and at all times thereafter, petitioners have been beyond all hope of financial rehabilitation and that the only effect of further proceedings on petitioners' behalf in the bankruptcy would be to postpone the inevitable liquidation of petitioners' financial affairs without benefit to them and resulting in great hardship to the creditors (R. 64-74).

No oral testimony was introduced in the District Court.

Thereafter petitioners prosecuted an appeal under section 24-B of the Bankruptcy Act to the United States Circuit Court of Appeals for the Ninth Circuit. On May 2, 1939, the Circuit Court of Appeals rendered its opinion and affirmed the orders entered in the District Court.

Thereafter petitioners made timely application to the Supreme Court of the United States for a writ of certiorari to review the judgment of the Circuit Court of Appeals aforesaid, and according to law the issuance of the mandate was stayed pending the disposition of the matter in the Supreme Court (R. 158).

On October 23, 1939, the petition for certiorari was denied without opinion. Immediately upon receipt of notice thereof, petitioners sought to obtain an Order withholding the mandate pending the anticipated decisions of the

Supreme Court interpreting section 75 of the Bankruptcy Act. Upon information that the mandate had already issued, petitioners moved in the District Court to withhold the entry thereof and moved simultaneously in the Circuit Court of Appeals to have the same recalled and held (R. 159). This application was instantly denied (R. 160).

On December 4, 1939, the Supreme Court handed down its decision in the case of *John Hancock Mutual Life Insurance Company* v. *Bartels*, 60 Supreme Court Rept. 221, 308 U. S. 180. As is hereinafter more fully developed, petitioners consider it to be controlling in the instant case and to require the correction of the decision of the Circuit Court of Appeals of May 2, 1939. Accordingly petitioners promptly filed in the Circuit Court of Appeals their motion and petition to recall the mandate and correct the judgment, upon the authority of the *Bartels* case (R. 160). On January 2, 1940, the Supreme Court rendered its decision in the case of *Kalb* v. *Feuerstein* (60 Supreme Court Rept. 343). Petitioners believe the propositions decided in the *Kalb* case are determinative of the instant case and left the decision of the Circuit Court of Appeals of May 2, 1939, absolutely without foundation.

Accordingly the aforesaid Motion and Petition was supplemented to call the attention of the Circuit Court of Appeals to this decision. The matter then remained pending in the Circuit Court of Appeals without action until March 22, 1940, when the Motion and Petition were denied without reason therefor being assigned (R. 162). Thereafter on April 29, 1940 this Court granted certiorari to review this last mentioned action of said Circuit Court of Appeals.

Questions Involved.

The questions involved in the case are briefly (1) the propriety of correcting a decision of a Circuit Court of Appeals to conform to a subsequent Supreme Court decision, and (2) the construction and interpretation of Sec-

tion 75 of the Bankruptcy Act with reference (a) to the nature and existence of a stay against proceedings in the State courts, (b) the propriety of refusing the farmer the benefits of subsection (s) on the grounds of bad faith proposal, and inability to refinance, and (c) the validity of orders of the District Court and Conciliation Commissioner relating to the appointment of a trustee in bankruptcy under subsection (s).

Specification and Assignment of Error.

I.

The United States Circuit Court of Appeals for the Ninth Circuit erred in denying petitioners' Motion and Petition to Recall and Correct its Mandate to the District Court of the United States for the District of Oregon.

Summary of Argument.

Petitioners contend that the decision of the Circuit Court of Appeals rendered herein on May 2, 1939, was erroneous in law, and that the error was established by the subsequent decisions of the Supreme Court in *John Hancock Mutual Life Insurance Company* v. *Bartels*, *post*, and *Kalb* v. *Feuerstein*, *post*, which held, contrary to said decision of the Circuit Court of Appeals, that after the filing of the amended petition under Section 75 of the Bankruptcy Act, the benefits of subsection (s) may not be arbitrarily refused on the grounds of asserted bad faith proposal or asserted inability to refinance, and that the initiation of proceedings under Section 75 automatically stays all action in the State courts until such proceedings have reached final disposition.

Petitioners further contend that the facts show timely application for correction of the error and that, since sound discretion required it, failure to make the correction constituted an abuse of discretion.

ARGUMENT.

Since the order herein to be reviewed was entered without written opinion, the basis for the denial is necessarily a matter of conjecture. However, there are but three possible grounds for denying petitioners' application, all of which must be assumed to have been resolved against petitioners. These are, first, that the Circuit Court of Appeals had no jurisdiction to make the correction; second, that the application was not timely, or, third, that the application was without merit. Each of these propositions is hereinafter separately discussed.

Point I.

The Circuit Court of Appeals Had Jurisdiction to Recall and Correct Its Mandate.

With respect to jurisdiction, respondents themselves acknowledged the inherent jurisdiction of a court to correct its judgments and orders upon timely application. The Supreme Court has often reaffirmed this proposition. *Wayne United Gas Company* v. *Owens Illinois Glass Company*, 57 Sup. Ct. Rep. 382, 300 U. S. 131; *United States* v. *Benz*, 51 Sup. Ct. 113, 282 U. S. 304.

Petitioners feel that the matter of the jurisdiction of the Circuit Court of Appeals to correct its mandate is so well settled as to warrant no further discussion.

Point II.

The Application to Recall and Correct the Mandate was Timely.

For convenience, the chronology of events relating to the application for correction of the error may be briefly restated as follows:

May 2, 1939—Decision of Circuit Court of Appeals on original appeal.

July 10, 1939—Petition for certiorari filed.

Oct. 23, 1939—Petition for certiorari denied.

Nov. 4, 1939—Motions to withhold mandate filed in Circuit Court of Appeals and District Court.

Nov. 6, 1939—Motions to withhold mandate denied.

Dec. 4, 1939—Decision of Supreme Court in John Hancock Mutual Life Insurance Company v. Bartels, post.

Jan. 2, 1940—Motion and petition to recall mandate and correct judgment filed in Circuit Court of Appeals.

Jan. 2, 1940—Decision of Supreme Court in Kalb v. Feuerstein, post.

Jan. 18, 1940—Motion and petition for recall and correction supplemented on basis of Kalb case.

Mar. 22, 1940—Motion and petition denied by Circuit Court of Appeals without opinion.

Apr. 12, 1940—Petition for certiorari filed.

Apr. 29, 1940—Certiorari granted.

It is petitioners' contention that the record shows all possible diligence on their part to obtain a correction of the error, and that under the authorities their application was timely.

It will be noted first, that the original decision of the Circuit Court of Appeals was rendered during the course of a regular term, that issuance of the mandate was stayed during that term by the filing of a petition for certiorari, that certiorari was denied during the succeeding regular terms of the Circuit Court of Appeals during which the mandate issued, the subsequent Supreme Court decisions were rendered, and the application for correction was made to and denied by the Circuit Court of Appeals.

With respect to proceedings other than in bankruptcy, it appears that the matter of terms is of considerable importance, and it is often said that a court retains jurisdiction over its judgments and orders *during the term*. Such a statement is incomplete and must be qualified.

Thus in *Bronsen* v. *Schulten*, 104 U. S. 410, 26 L. Ed. 797, the Supreme Court, while denying the relief prayed for because of a lapse of 17 years time, pointed out that the only judgments over which jurisdiction is lost by the expiration of the term are "final judgments", and that where steps are taken within the term to correct the error, the judgment does not become final.

Therefore in the instant case where a petition for certiorari was filed during the term at which the decision was made, and the issuance of the mandate was accordingly stayed, the decision could not have become final at the term when rendered.

The language of many decisions indicates that the time of the issuance of the mandate is controlling rather than the time when the decision is made. In the instant case, the mandate was not issued until the term at which the application for correction was made.

In *Miocene Ditch Co.* v. *Campion*, 197 Fed. 497 (9th Circuit) this same Circuit Court of Appeals considered the time of issuance of the mandate as determinative, and where the term at which the mandate had issued had expired, held that the application was not timely.

In *Staude Mfg. Co.* v. *Labombards*, 247 Fed. 879 (1st Circ.) the mandate had issued, and, after the expiration of the term, application was made for its recall and correction. Though the mandate had not been entered below, the petition for recall was denied because the mandate had issued in the previous term. The court there cited Foster, Federal Practice, 4th Ed., p. 2149, for the proposition that mandates can be recalled during the term for correction but not afterwards.

In *Utah P. & L. Co.* v. *U. S.*, 242 Fed. 924, the mandate was recalled after the term, for correction to conform to an intervening Supreme Court decision.

In 5 C. J. S., Sec. 1996, the rule is stated that:

> "An appellate court generally has power to recall its mandate, at least during the term at which it was issued."

In the instant case, the record shows that petitioners applied to the Circuit Court of Appeals for correction of the error during the term at which the judgment became final and the mandate issued. *No intervening rights have been or can be shown.* Under the authorities, petitioners' application was clearly in time.

Finally, there is substantial authority for the proposition that there are no terms in bankruptcy proceedings.

In *Sandusky* v. *National Bank*, 23 Wall. 289, 23 L. Ed. 155, the Supreme Court said:

> "A proceeding in bankruptcy from the time of its commencement by the filing of a petition to obtain the benefits of the act, until the final settlement of the estate of the bankrupt, is but one suit. The District Court for all purposes of its bankruptcy jurisdiction is always open. It has no separate terms. Its proceedings in any pending suit are therefore at all times open for reexamination upon application therefor in appropriate form. Any order made in the progress of the cause may be subsequently set aside and vacated upon proper showing made, provided rights have not become vested under it which will be disturbed by its vacation.

In re Glory Bottling Company of New York, Inc., 283 Fed. 110 (C. C. A. 2nd), the court said:

> "In bankruptcy proceedings the whole period from the filing of the petition to final disposition constitutes but one term."

In *Van Deveer* v. *Phillips and Buttorf*, 112 Fed. 966 (C. C. A. 5th), the court said:

> "In other proceedings the power of the Court to set aside its decrees on proper showing expires with the

> end of the term in which the decree is made. In bankrupt proceedings no such limitation obtains, or rather the whole period from the filing of the petition to the final settlement of the proceedings constitutes but one term."

Since there can be no question here of *laches* or vested rights, it is submitted that under the authorities, petitioners' application was timely.

Point III.

Petitioners' Application for Correction was Meritorious.

Petitioners contend that error in two vital respects has been established in the decision of May 2, 1939, by the cases of *John Hancock Mutual Life Insurance Company* v. *Bartels*, 308 U. S. 180, 60 Sup. Ct. 221, and *Kalb* v. *Feuerstein*, 60 Sup. Ct. 343.

The Bartels Case.

(a) On Bad Faith and Inability to Refinance.

The facts in the *Bartels* case were that after adjudication under subsection (s) of Section 75, and after application for the benefits of the subsection, the adjudication was set aside and the debtor proceedings dismissed by the District Court, on the grounds that the debtor had not made a good faith offer for a composition or extension, and that there was no reasonable probability of the debtor's financial rehabilitation. On appeal, the Circuit Court of Appeals for the Fifth Circuit set aside the order dismissing the debtor's petition and directed that the proceedings be reinstated. Because of the materiality in the present connection of the language of Mr. Chief Justice Hughes, speaking for the Supreme Court in affirming the Circuit Court of Appeals, we quote somewhat at length from the opinion:

> At the hearing of the motion on April 5, 1938, the court received the evidence previously taken before the

commissioner and additional testimony. Thereupon the motion was granted. The District Judge said in his opinion that the debtor had not made any proposal which could be construed as a "Good faith offer for an extension or composition" and hence the debtor was not entitled to be adjudged a bankrupt under subsection (s). The District Judge observed that the evidence was conflicting as to the value of the land (100 acres); that, separating the land from its improvements, certain of the debtor's witnesses placed its value at $70 an acre and the improvements at $5,000 or $6,000, while witnesses for the creditor valued the land at about $40 an acre and the improvements at about $2,000.00. He thought that there was no reasonable probability of the debtor's financial rehabilitation. In that view the District Judge concluded "that the order adjudicating the debtor a bankrupt under subsection (s) was improperly entered and should be set aside and the case dismissed."

We think that the District Judge failed to follow the mandate of the statute and that the Court of Appeals was right in reversing the judgment and ordering the proceeding to be reinstated.

The subsections of Section 75 which regulate the procedure in relation to the effort of a farmer-debtor to obtain a composition or extension contain no provision for a dismissal because of the absence of a reasonable probability of the financial rehabilitation of the debtor.[3] Nor is there anything in these subsections which warrants the imputation of lack of good faith to a farmer-debtor because of that plight. The plain purpose of Section 75 was to afford relief to such debtors who found themselves in economic distress however severe, by giving them the chance to seek an agreement with their creditors (subsections (a) to (r)) and, failing this, to

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[3] What is said upon this point in Note 6 in *Wright* v. *Vinton Branch*, 300 U. S. 440, 462, was not essential to the opinion in that case *and is not supported by the terms of the statute.*

ask for the other relief afforded by subsection (s). The farmer-debtor may offer to pay what he can, as Bartels did, and he is not to be charged with bad faith in taking the course for which the statute expressly provides. The only reference in Section 75 to good faith is found in subsection (i), which relates solely to the confirmation of proposals for composition or extension when the court must be satisfied that the offer and its acceptance are in good faith and have not been made or procured by forbidden means or except as provided in the statute. That provision manifestly hits at secret advantages to favored creditors or other improper or fraudulent conduct.

As Bartels' case thus fell within subsection (s), he amended his petition and asked to be adjudicated a bankrupt as that subsection permits. He was so adjudicated. Bartels then asked, also as provided in subsection (s), that his property be appraised, that his exception be set aside to him as provided by state law and that he be allowed to retain possession of his property under the supervision of the court, that is, subject to such orders as the court might make in accordance with the statute. The court failed to take that action. Instead of having the property appraised, the court received conflicting testimony as to value, discussed the chances of the debtor's rehabilitation and dismissed the petition and all proceedings thereunder.

The scheme of the statute is designed to provide an orderly procedure so as to give whatever relief may properly be afforded to the distressed farmer-debtor, while protecting the interests of his creditors by assuring the fair application of whatever property the debtor has to the payment of their claims, the priorities and liens of secured creditors being preserved.

In the instant case, the language of the Circuit Court of Appeals in this connection was as follows:

"The court found that Appellants' have made no attempt to comply with the conditions required of them

by the 'Frazier-Lemke' amendment to the Acts of Congress in relation to bankruptcy, necessary to be complied with by them in order to obtain the right and privilege of a three years' stay of enforcement of the obligations owned and held by their creditors and possession of the real and personal property described in the schedules; 'that appellants' at the time of the filing of (their) petition, on December 19, 1934, and at all times thereafter, have been in truth and in fact beyond all hope of financial rehabilitation; 'and that' the only effect of further proceedings and delays on their behalf in this bankruptcy proceeding will be to postpone the inevitable liquidation of their financial affairs without benefit to them and resulting in great hardship to the creditors.'

"Thus, in effect, the court found (1) that appellants did not comply with the provisions of Section 75, and (2) that they were unable to refinance themselves within three years, or at all. Either of these facts would have warranted denial of the relief sought by appellants."

It is pointed out in the opinion that the orders appealed from were based upon findings and that the evidence upon which the findings were based was not incorporated in the record. As a matter of fact, no testimony was ever taken as a basis for these findings but the same were arbitrarily made by the Judge of the District Court.

At the risk of extending the argument in this connection it seems essential to quote the relevant portions of the District Court's findings:

Findings of Fact.

1.

That on the 19th day of December, 1934, Martin J. Bernards and Lena Bernards were, by order and judgment of this court, duly adjudicated bankrupts, and said bankrupts sought relief under the provisions of

the "Frazier-Lemke" amendment, known as subdivision "s", Section 75 of the Act of Congress, known as the Bankruptcy Act.

XI.

That the said bankrupts have made no attempt to comply with the conditions required of them by the "Frazier-Lemke" amendment to the Acts of Congress in relation to bankruptcy, necessary to be complied with by them in order to obtain the right and privilege of a three year's stay of enforcement of the obligations owned and held by their creditors and possession of the real and personal property described in the schedules attached to their debtor's petition on file in this cause on a rental basis, as provided in subdivision (s) of Section 75 of the Bankruptcy Act.

XII.

That the said Martin J. Bernards and Lena Bernards, bankrupts, have never at any time submitted any proposal for a composition and extension which was an equitable and feasible plan for the liquidation of the claims of their secured creditors or other creditors which would result in the financial rehabilitation of the said bankrupts.

XIII.

That the said Martin J. Bernards and Lena Bernards at the time of the filing of the debtor's petition, on December 19, 1934, and at all times, thereafter, have been in truth and in fact beyond all hope of financial rehabilitation and the only effect of further proceedings and delays on their behalf in this bankruptcy proceeding will be to postpone the inevitable liquidation of their financial affairs without benefit to them and resulting in great hardship to the creditors, preferred and common, of the said bankrupt.

XIV.

On account of the findings aforesaid, and by reason of other matters appearing in the record and files in this cause and which, by reference, are made a part of

this answer, the bankrupts have shown and established that there has at no time since the inception of these bankruptcy proceedings, been any possibility of financial rehabilitation of the bankrupts; that they have been barred and precluded from the relief conditionally granted by sub-division (s) of Section 75 of the Bankruptcy Act.

Considering these findings in connection with the language of the Circuit Court of Appeals, and comparing the result with the language of the *Bartels* case, it immediately becomes apparent that the Circuit Court of Appeals approved the action of the District Court in refusing petitioners the benefits provided by subsection (s) on the grounds that they did not comply with the provisions of Section 75, and that they were unable to refinance themselves within three years or at all, while in the *Bartels* case the Supreme Court held that the District Court must follow the mandate of the statute and cannot refuse the benefits of the subsection because the farmer-debtor offered to pay what he could, or because of the absence of a reasonable probability of his financial rehabilitation.

The interpretations of Section 75 (s) made in the *Bartels* case were confirmed and enlarged by this Court in *Borchard et al. v. California Bank et al.*, 60 Sup. Ct. 957. Because of the similarity to the instant case we quote from the opinion:

> We are of opinion that the action of the District Court in permitting the creditor to proceed to a sale for the enforcement of its liens at this stage of the proceeding was contrary to the provisions of Section 75 (s). That this is so is made plain by our decisions in Wright *v.* Vinton Branch of Mountain Trust Bank, supra, and John Hancock Ins. Co. *v.* Bartels, 308 U. S. 180. As was said in the latter case (p. 187):
>
> > "The scheme of the statute is designed to provide an orderly procedure so as to give whatever

> relief may properly be afforded to the distressed farmer-debtor, while protecting the interests of his creditors by assuring the fair application of whatever property the debtor has to the payment of their claims, the priorities and liens of secured creditors being preserved."

Instead of prosecuting the cause before the Conciliation Commissioner pursuant to the debtors' petition, the bank resorted to a procedure not contemplated by the statute, evidently on the theory that it could obtain some advantage by that course. By written stipulations the bank consented to the retention of possession by the debtors and arranged that they should cooperate in the cultivation and conservation of the real estate, for payment of taxes, and for payments to the debtors. For more than thirty-one months after the petition for appraisal was filed no action was taken. An appraisal was thereafter made. No stay order has been entered fixing terms on which the debtors are to remain in possession. The petitioners were entitled to compliance with the procedure required by the statute. The bank, at any time, could have obtained action by the Conciliation Commissioner and the court, in accordance with the statute. It cannot now maintain that the disorderly and unauthorized procedure followed by the parties is the equivalent of that prescribed by the statute and that, as the petitioners have not been able to rehabilitate themselves, it is entitled to enforce its liens.

The judgment is reversed and the cause is remanded for further proceedings in conformity with this opinion.

In the *Borchard* case the farmer-debtors remained in possession for more than thirty-one months reaping the harvests, evidently under a rental arrangement more severe than that granted them by the statute. On the other hand in the instant case the petitioners seeded their crops in the fall of 1934 and spring of 1935 but the harvests were reaped by the respondents subsequent to the purported sheriff's sale on June 29, 1935.

Briefly, it may be said that the Circuit Court of Appeals, in its decision, relied upon its interpretation of subsection (s) of Section 75, and footnote 6 to the case of *Wright* v. *Vinton Branch*, 300 U. S. 440, and concluded therefrom that under the findings petitioners were not entitled to relief. The decision in the *Bartels* case as enlarged and confirmed in the *Borchard* case has established the error in the lower court's decision, and it has now been settled once and for all that when the farmer-debtor amends his petition and requests the benefits of subsection (s), the Conciliation Commissioner and the District Court must carry out the mandatory provisions of the said subsection (s).

(b) On Compliance With Section 75.

Some mention should here be made of the finding that "appellants did not comply with the provisions of Section 75." The findings of the District Court in this connection, hereinbefore quoted verbatim, indicate clearly that this relates solely to the offer of composition and extension made while under subsections (a) to (r). Should there be any doubt remaining on this score, reference to the record made in the District Court shows that petitioners did everything that could properly be required of them, and that there is no foundation in the record for this indefinite finding except the question of "good-faith proposal". Petitioners challenge respondents to point out to the Court any particular wherein appellants failed to meet the requirements of the act, except for the disputed matters of good faith and financial rehabilitation, both of which have been disposed of by the *Bartels* decision.

(c) On Appointment of Trustee.

The question of the appointment of a trustee is material in connection with the consideration of the Bartels decision. It will be recalled that on August 29, 1936, the Conciliation

Commissioner appointed a trustee, that this order was reviewed and affirmed by the District Court on December 15, 1936, that no appeal was taken therefrom, but that on January 4, 1937, within the time for appeal, petitioners made application for removal of the trustee and possession of their estate, which was denied on January 11, 1937. On January 15, 1937, petitioners applied to the District Court for reversal of the commissioner's orders, including those of August 29, 1936 and January 11, 1937. On January 29, 1937, petitioners applied to the Conciliation Commissioner for a review of his order of January 11, 1937. On April 13, 1938, after the District Court had delayed action for over a year, petitioners filed a motion to vacate and set aside all orders of the court, referee and Conciliation Commissioner tending to set aside or delay carrying out the provisions of Section 75. On May 10, 1938, the District Court confirmed the Conciliation Commissioner's order of January 11, 1937, in which order the Conciliation Commissioner refused to remove the trustee, and on the same day denied petitioners' petition of January 15, 1937, and motion of April 13, 1938, whereupon this appeal followed.

Since the attempted appointment of a trustee by the Conciliation Commissioner appears from the record to have been premised upon the finding of inability to refinance, its consideration becomes important in connection with the *Bartels* case. In the first place, petitioners earnestly contend that in view of the *Bartels* decision and the other authorities, the appointment of trustee was absolutely void as an act in excess of jurisdiction.

In 15 C. J., Courts, p. 729, Par. 24, the author says:

> "Excess of Jurisdiction. Excess of Jurisdiction as distinguished from the entire absence of jurisdiction, means that the act, although within the general power of the judge, is not authorized, and therefore void, with respect to the particular case, because the con-

> ditions which alone authorize the exercise of his general power in that particular case are wanting, and hence the judicial power is not in fact lawfully invoked."

Considering this language in the light of the wording of subsection (s), as construed in the case of *Wright* v. *Vinton Branch, supra,* and the *Bartels* case, petitioners believe that where the Conciliation Commissioner is confronted with the mandatory provisions of subsection (s) but arbitrarily refuses to comply with them and appoints a trustee, his act is void as exceeding his jurisdiction and must be held for naught, whether on direct or collateral attack.

In *Wright* v. *Vinton Branch, supra,* the Supreme Court said:

> "The entry of the order of reference initiated proceedings designed to move, through the appointment of appraisers, the appraisal, and the referee's order recognizing the debtor's right to possession, to the grant of the stay by the court. Under the Act no further affirmative action by petitioner precedent to his obtaining the stay was necessary. The mortgagee was not obliged to delay his challenge to the validity of the stay and its essential incidents until these officials had complied with the mandatory provisions of the Act."

In the *Bartels* case, *supra,* the Supreme Court said:

> "We are not here concerned with questions which may arise in the course of the administration under the statute, but merely with the duty to follow the procedure which the statute defines and the District Court failed to observe. We hold that on his amended petition invoking subsection (s) Bartels was entitled to be adjudged a bankrupt and to have his proceeding for relief entertained and his property dealt with in accordance with that subsection."

Petitioners sincerely contend that the attempted appointment of a trustee was utterly and completely void.

Assuming for the purpose of argument, that the order was not void, but voidable, petitioners submit that their petition of January 4, 1937, constituted an application for a rehearing on the matter of the trustee's appointment, and that, where filed within the thirty day appeal period and before intervening rights could or did vest, it was effective to preserve jurisdiction over the question.

In *Wayne United Gas Co.* v. *Owens Illinois Glass Co.*, 300 U. S. 131, 57 Sup. Ct. 383, this Court said:

> "Bankruptcy court in exercise of sound discretion if no intervening rights will be prejudiced by its action, may grant rehearing on application, diligently made, and rehear case on merits, and even though it reaffirms its former action and refuses to enter decree different from original one, order entered on rehearing is appealable and time for appeal runs from its entry."

Petitioners submit that regardless of whether the order appointing a trustee was voidable or void, the question has been properly presented before both the Circuit Court of Appeals and this Court, and that under the authority of the *Bartels* case, the order of appointment should have been, and should be, set aside.

The Kalb Case.

In *Kalb* v. *Feuerstein*, 60 Sup. Ct. 343, this Court states with unmistakable clarity that at all times and under all circumstances (except where express permission of the bankrutpcy court is obtained) the exclusive jurisdiction over the property of a farmer-debtor rests in the bankruptcy court, and the State courts are powerless to proceed.

In the original decision, the Circuit Court of Appeals had this to say regarding the matter of a stay:

> "Appellants assume, erroneously, that the foreclosure sales were prohibited by subsection (o) of Section 75, 11 U. S. C. A. Section 203 (o). The prohibition in sub-

section (o) applied only to a period 'prior to the confirmation or other disposition of the composition or extension proposal', which period expires when the debtor is adjudged a bankrupt. Hardt *v.* Kirkpatrick, 9 Cir., F 2d 875, 898. In this case it expired on December 19, 1934. The 'stay' provided for in subsection (s), as amended, is not an automatic stay, but is a judicial stay, to be granted only upon compliance with specified conditions. Appellants never obtained, and —upon the facts found —were never entitled to any such stay."

It readily appears, then, that the decision of the Circuit Court of Appeals was founded upon the propositions that an adjudication under original subsection (s) of Section 75 constituted a disposition of the proceedings for extension or composition, and that the only stay provided under subsection (s) is a judicial, not an automatic, stay. The fallacy of these propositions is demonstrated in the *Kalb* case in the following language:

"As stated by the Senate Judiciary Committee in reporting these amendments: '* * *subsection (n) brings all of the bankrupt's property, wherever located, under the absolute jurisdiction of the bankruptcy court, where it ought to be * * *'

"* * * By reading subsection (n) to (o) as now amended in this bill, it becomes clear that it was the intention of Congress when it passed section 75, that the farmer-debtor and all of his property should come under the jurisdiction of the court of bankruptcy, and that the benefits of the act should extend to the farmer prior to the confirmation of sale, during the period of redemption, and during a moratorium; and that no proceedings after the filing of the petition should be instituted, or if instituted prior to the filing of the petition, should not be maintained in any court, or otherwise.

"* * * In harmony with the general plan of giving the farmer an opportunity of rehabilitation, he was relieved —after filing a petition for composition and extension

> —of the necessity of litigation elsewhere and its consequent expense. *This was accomplished by granting the bankruptcy court exclusive jurisdiction of the petitioning farmer and all his property with complete and self-executing statutory exclusion of all other courts.*"

In the light of the Kalb decision interpreting Section 75, there can be no doubt but that the provisions of subsections (n) and (o) remain in effect after the farmer-debtor amends his petition asking to be adjudged a bankrupt and after an adjudication pursuant to such request.

The decision of the Circuit Court of Appeals, here in question, holds that the adjudication on December 19, 1934, under the invalid subsection (s) was a disposition of the proceedings for composition or extension and a termination of the stay provided by subsection (o).

This is error for two reasons:

First. Since an adjudication under valid subsection (s) does not terminate the stay provided by subsection (o), certainly an adjudication under invalid (s) can be no more effective.

Second. When an Act of Congress is declared to be unconstitutional, it was unconstitutional from its inception and any actions taken or done thereunder are nullities.

The order of adjudication entered on December 19, 1934, under the unconstitutional subsection (s) was and is a nullity, and as such, ineffective to terminate the proceedings for composition or extension and ineffective to terminate the stay provided by subsection (o).

Petitioners contentions on this point are supported by the decision of this Court in *Union Joint Stock Land Bank* v. *Byerly*, 60 Sup. Ct. 773. There the debtor, like petitioners here, filed his amended petition for adjudication under original subsection (s), and was so adjudicated

on February 11, 1935. On May 27, 1935, original subsection (s) was held invalid. On August 26, 1935, on application of the debtor himself, the proceeding was dismissed. The language of the opinion, while denying relief to the debtor because he dismissed his proceedings under Section 75, plainly holds that notwithstanding the adjudication under invalid (s), the stay is still in effect so long as the proceedings remain pending.

We quote the material portion of the opinion:

> "Exclusive jurisdiction of the debtor and his property vested in the District Court on the filing of the petition. Up to that time jurisdiction of the debtor and the mortgaged property was in the State Court. Without action by the District Court the State Court could not have proceeded further."
>
> "The *termination* of the bankruptcy proceeding restored the jurisdiction and power of the State Court and its further proceedings in the foreclosure suit were not subject to attack in the bankruptcy court.
>
> "Although the State Court's jurisdiction was superseded by that of the bankruptcy court, it again attached *upon the dismissal* of the bankruptcy case, and, thenceforward, as respects the foreclosure suit, and the State Court's procedure, it was as if no bankruptcy case had ever existed." (Italics ours.)

Under this plain language one cannot doubt that in the instant case *where the proceedings were never dismissed*, the exclusive jurisdiction of the petitioners' estate at all times vested in the bankruptcy court and the attempted sales in the State court were void and nullities.

In the light of the *Kalb* case, as further substantiated by the *Byerly* case, it is now settled law that the State courts are without jurisdiction—except upon express permission of the District Court—during the entire pendency of the proceedings in the Bankruptcy Courts, and the de-

cision of *Hardt* v. *Kirkpatrick*, relied upon by the Circuit Court of Appeals in its decision in the instant case, has been entirely rejected and repudiated on this point.

Conclusion.

Your petitioners herein were and are the owners of the largest and finest farm in Washington County, Oregon. Being victims of the economic depression they sought relief under the Frazier-Lemke Farm Moratorium Act, which was designed and enacted by Congress and sustained by the Supreme Court to give applicants thereunder a breathing spell and an opportunity of financial rehabilitation.

Not only did your petitioners, as required by law, file their original petition, their amended petition, their petition for the benefits of the act and secure their order of reference, but in addition thereto made the following attempts to obtain compliance with the statute by the Conciliation Commissioner and the District Court:

July 15, 1936.—Petitioned for possession of the farm and an accounting for crops removed.

Aug. 8, 1936.—In their reply further and again requested the benefits of the Act as passed by Congress on August 28, 1935.

Jan. 4, 1937.—Petitioned Conciliation Commissioner for possession of the whole of their estate, for an immediate appraisal and permission to amend schedules.

Jan. 15, 1937.—Petitioned District Court for the full benefits of the Frazier-Lemke Act and excepting to all orders theretofore entered in derogation of their rights.

Apr. 13, 1938.—Motion filed in the District Court requesting compliance with the mandatory provisions of the Act and challenging the validity of all orders entered in conflict with such provisions.

On the other hand the respondents have consistently urged upon the District Court and Conciliation Commis-

sioner non-compliance with the Act as shown by the following:

July 24, 1936.—Answer and cross petition of respondents Johnson and The United States National Bank requesting the Conciliation Commissioner that petitioners be held not farmers, that Section 75 (s) be held unconstitutional as applied to the land, and for appointment of a trustee.

June 15, 1937.—Answer of Catherine H. Collins requesting District Court for an order holding land free and clear of bankruptcy proceeding, and that Conciliation Commissioner close the proceeding speedily.

July 7, 1937.—Answer of Joseph M. Loomis requesting District Court that his acts be ratified and approved, and that the trustee be allowed additional expenses and attorney fees.

Sept. 1, 1937.—Answer of Mr. M. R. Johnson and The United States National Bank requesting the District Court for an order that land be free of bankruptcy proceeding, that trustee declare dividend and completely close the proceeding.

Feb. 17, 1938.—Motion of Mr. M. R. Johnson and The United States National Bank requesting District Court for an order holding petitioners to be not farmers, that land in schedules to be not in the jurisdiction of District Court, and that Conciliation Commissioner be ordered *to liquidate petitioners in the manner provided by the Bankruptcy laws other than Section 75.*

After six years of litigation the rental stay order has not yet been entered but instead petitioners have had taken from them their farm and home, their bonds, their crops, their live stock, their farming equipment, their furniture and even their bedding. Petitioners' personal property has been *purposely dissipated.* Petitioners have actually and literally been set on the street and reduced to the status of paupers, and in addition have been deprived of six of the most productive years of their lives. Unless

relief is granted it would have been much better as far as the instant case is concerned, had Section (75) never been made law.

Petitioners for six years have struggled to secure the benefit of their legal rights for themselves and their family in the face of unsympathetic lower courts and bitter resistance from opposing moneyed interests. With practically no encouragement through these long years, petitioners refused to give up, but had confidence throughout that justice and right must ultimately prevail. Finally, this Court, in the *Bartels* and *Kalb* decisions, had occasion to pass upon the very matters at stake in petitioners' case, and in so doing vindicated petitioners' position throughout.

The only question remaining is whether petitioners, having finally had available an authoritative and favorable interpretation of the law, must be deprived of the benefits due them because certiorari was once denied them some forty days prior to the entry of the controlling decision in the *Bartels* case. Petitioners cannot believe that where they have so diligently pursued all remedies available, and where sound discretion permits relief to be granted, that they will be deprived of their due. Petitioners respectfully submit that the order complained of should be reversed, with directions to correct the mandate to comply with the law.

Respectfully submitted,

MARTIN J. BERNARDS,
LENA BERNARDS,
Petitioners in pro. per.

WM. LEMKE,
Of Counsel.

APPENDIX.

Section 75, Bankruptcy Act, Agricultural Compositions and Extensions, 11 U. S. C. A., Sec. 203.

Subsection (n).

"The filing of a petition or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding same to the clerk of court, praying for relief under section 75 of this Act, as amended, shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property, including, among others, contracts for purchase, contracts for deed, or conditional sales contracts, the right or the equity of redemption where the period of redemption has not or had not expired, or where a deed of trust has been given as security, or where the sale has not or had not been confirmed, or where deed had not been delivered, at the time of filing the petition.

"In all cases where, at the time of filing the petition, the period of redemption has not or had not expired, or where the right under a deed of trust has not or had not become absolute, or where the sale has not or had not been confirmed, or where deed had not been delivered, the period of redemption shall be extended or the confirmation of sale withheld for the period necessary for the purpose of carrying out the provisions of this section. The words 'period of redemption' wherever they occur in this section shall include any State moratorium, whether established by legislative enactment or executive proclamation, or where the period of redemption has been extended by a judicial decree. In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the courts, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on

the day when the farmer's petition, asking to be adjudged a bankrupt, was filed with the clerk of court or left with the conciliation commissioner for the purpose of forwarding same to the clerk of court."

Subsection (o)

"Except upon petition made to and granted by the Judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court.

"(1) Proceedings for any demand, debt, or account, including any money demand;

"(2) Proceedings for foreclosure of a mortgage on land, or for cancellation, recession, or specific performance of any agreement for sale of land or for recovery of possession of land;

"(3) Proceedings to acquire title to land by virtue of any tax sale;

"(4) Proceedings by way of execution, attachment or garnishment;

"(5) Proceedings to sell land under or in satisfaction of any judgment or mechanic's lien; and

"(6) Seizure, distress, sale or other proceeding under an execution or under any lease, lien, chattel mortgage, conditional sale agreement, crop payment agreement, or mortgage."

Subsection (s).

"Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt. Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his

property, wherever located, whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. Upon such a request being made, the referee, under the jurisdiction of the court, shall designate and appoint appraisers, as provided for in this Act. Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this Act: *Provided*, That in proceedings under this section, either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal.

"(1) After the value of the debtor's property shall have been fixed by the appraisal herein provided, the referee shall issue an order setting aside to such debtor, his unencumbered exemptions, and his unencumbered interest or equity in his exemptions, as prescribed by the State law, and shall further order that the possession, under the supervision and control of the court, of any part or parcel or all of the remainder of the debtor's property shall remain in the debtor, as herein provided for, subject to all existing mortgages, liens, pledges, or encumbrances. All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear.

"(2) When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of three years. During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and

control of the court, provided he pays a reasonable rental semiannually for that part of the property of which he retains possession. The first payment of such rental shall be made within one year of the date of the order staying proceedings, the amount and kind of such rental to be the usual customary rental in the community where the property is located, based upon the rental value, net income, and earning capacity of the property. Such rental shall be paid into court, to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed among the secured and unsecured creditors, and applied on their claims, as their interests may appear. The court, in its discretion, if it deems it necessary to protect the creditors from loss by the estate, and/or to conserve the security, may order sold any unexempt perishable property of the debtor, or any unexempt personal property not reasonably necessary for the farming operations of the debtor, such sale to be had at private or public sale, and may, in addition to the rental, require payments on the principal due and owing by the debtor to the secured or unsecured creditors, as their interests may appear, in accordance with the provisions of this Act, and may require such payments to be made quarterly, semiannually, or annually, not inconsistent with the protection of the rights of the creditors and the debtor's ability to pay, with a view to his financial rehabilitation.

"(3) At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal: *Provided*, That upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to all secured and unsecured creditors, as their interests may appear, and thereupon the courts shall, by an order, turn over full possession and title of said

property free and clear of encumbrances to the debtor: *Provided*, That upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction. The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum per annum interest, into court, and he may apply for his discharge, as provided for by this Act. If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this Act.

"(4) The conciliation commissioner, appointed under subsection (a) of section 75 of this Act, as amended, shall continue to act, and act as referee, when the farmer debtor amends his petition or answer, asking to—adjudged a bankrupt under the provisions of subsection (s) of section 75 of this Act, and continue so to act until the case has been finally disposed of. The conciliation commissioner, as such referee, shall receive such an additional fee for his services as may be allowed by the court, not to exceed $35 in any case, to be paid out of the bankrupt's estate. No additional fees or costs of administration or supervision of any kind shall be charged to the farmer debtor when or after he amends his petition or answer, asking to be adjudged a bankrupt, under subsection (s) of section 75 of this Act, but all such additional filing fees or costs of administration or supervision shall be charged against the bankrupt's estate. Conciliation commissioners and referees appointed under section 75 of this Act shall be entitled to transmit in the mails, free of postage, under cover of a penalty envelope, all matters which relate exclusively to the business of the courts, including notices to creditors. If, at the time that the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt, a receiver is in charge of any of his property, such receiver shall be divested of possession, and the property returned to the possession of such

farmer, under the provisions of this Act. The provisions of this Act shall be held to apply also to partnerships, common, entirety, joint, community ownerships, or to farming corporations where at least 75 per centum of the stock is owned by actual farmers, and any such parties may join in one petition.

"(5) This Act shall be held to apply to all existing cases now pending in any Federal court, under this Act, as well as to future cases; and all cases that have been dismissed by any conciliation commissioner, referee, or court, because of the Supreme Court decision holding the former subsection (s) unconstitutional, shall be promptly reinstated, without any additional filing fees or charges. Any farmer debtor who has filed under the General Bankruptcy Act may take advantage of this section upon written request to the court; and a previous discharge of the debtor under any other section of this Act shall not be grounds for denying him the benefits of this section.

"(6) This Act is hereby declared to be an emergency measure and if in the judgment of the court such emergency ceases to exist in its locality, then the court, in its discretion, may shorten the stay of proceedings herein provided for and proceed to liquidate the estate.

Approved, August 28, 1935.

THE UNITED STATES OF AMERICA,
State of Oregon,
County of Washington, ss:

I, Martin J. Bernards, being first duly sworn depose and say: That I am one of the petitioners herein; that I served the within brief upon A. D. Platt of attorneys for Respondents Johnson and the United States National Bank on August 9, 1940, at Portland, Oregon, by delivering a copy thereof certified to by me as being a true copy, to said A. D. Platt in person; that on said day I likewise served said brief upon William Brewster attorney for Respondent Collins in the same manner; that on the same day I served said brief upon William G. Hare of attorneys for Respondent

Loomis by depositing a copy thereof certified to by me in the United States mails addressed to the said William G. Hare at Hillsboro, Oregon, postage prepaid.

MARTIN J. BERNARDS.

Subscribed and sworn to before me this ninth day of August, 1940.

FRANCES WOODS,
Notary Public for Oregon.

[SEAL.] *Notary Public for Oregon.*

My Comm. Expires Oct. 5, 1943.

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